IN THE

Supreme Court of the United States

OCTOBER TERM, 1919

GEORGE A. COLE,
ED. MALLEY,
GILBERT C. ROSS, *et al.*,
Petitioners,

vs.

JOSEPH RALPH, *Respondent.*

} Nos. 172 and 173.

PETITIONERS' REPLY BRIEF

In our opening brief we stated that two main contentions are presented to this Court for review:

1. Whether error was committed in refusing to give instructions on the subject of adverse possession, which included discovery as an essential element.

2. Whether error was committed in refusing to give instructions on the subject of adverse possession which omitted mention of discovery as an essential element.

The first question is withdrawn from consideration of this Court by the specific admission of respondent's counsel in their brief (bottom p. 43, top p. 44) in that to the refusal of the trial court to give these instructions no exception was taken or objection urged.

Upon our second proposition, respondent's counsel state that they do not rely upon the Statute of Limitations of Nevada—that the Nevada Statute merely fixes the time —but that Section 2332, U. S. R. S., is a statute of repose, and that holding and working of a claim for the period of the local statute is the full legal equivalent of a valid location, including discovery, and dispenses with the necessity of proving upon the trial a discovery of mineral. (Respondent's brief, p. 34, bottom p. 35, top p. 36.)

We accept the issue and tender, and submit these questions upon the briefs heretofore filed.

The respondents but faintly argue their previous contentions upon adverse possession, and rely (Respondent's Brief, p. 2) upon other and numerous alleged errors committed by the trial court, but which were evidently not seriously considered by the Circuit Court of Appeals.

We will discuss but briefly the points now attempted to be argued by counsel for respondent in the appendix to their brief.

THE QUESTION OF PARTIES PLAINTIFF

This question was disposed of by the trial court on motion for non-suit at the conclusion of the plaintiffs' evidence by saying (R. p. 532):

"In view of the statute [Revised laws of Nevada, 1912, Section] which says that the court may in furtherance of justice allow a party to amend his pleadings by adding to the parties, or by striking out parties, I cannot

dismiss this action on that ground; and particularly in the absence of any authorities which so hold."

Exception to this ruling was waived by defendant introducing his evidence.

At the close of the case the defendant tendered instructions on the subject of parties plaintiff which were repetition of the same ground for non-suit and which, if granted, would have been mandatory and have disposed of the case so far as the plaintiffs were concerned (R. pp. 1221 and 1222); and at the conclusion of the Court's charge to the jury counsel undertook (R. p. 1237) to except generally to the refusal of the court to give instructions requested by the defendant, and then proceeded (R. pp. 1237-1240) to specify the particulars to which exception was taken, without mentioning the failure to grant the prayers on the subject of parties.

The points were attempted to be presented in the Circuit Court of Appeals by assignments of error, but were there ignored by that court as not having been reserved or as being without merit. If any ground for a non-suit or directed verdict had been found by the Appellate Court the case would have gone off on that ground.

As, however, the respondent is now contending that the questions are presented, and that there was a total failure of title in one case and fatal misjoinder of plaintiffs in the other, and in his brief here has presented the facts incorrectly and confusedly, we deem it proper to make a correct statement of the facts and point out clearly the situation regarding parties plaintiff.

GUY DAVIS ADVERSE

The Guy Davis placer was located on September 6, 1913, by Guy Davis and Noah Faubert.

On November 11, 1913, Davis and Faubert executed a contract wtih Geo. B. Thatcher and Wm. Forman (Ex. "T" R. p. 473) which contained (p. 474) a conveyance to Thatcher and Forman of a one-tenth interest. This paper appears not to have been recorded.

On July 24, 1914, Faubert conveyed by deed recorded July 22, 1914; a one-fourth interest to Geo. B. Thatcher (Ex. "W" R. p. 482).

Adverse claim (Ex. "L" R. p. 443) was filed on September 24, 1914, on behalf of Davis, Faubert and Thatcher, then holders of the title of record as shown by abstract of title filed with the adverse claim, as required by Land Office Regulations.

The adverse suit was filed on September 30, 1914, by Faubert, Davis and Thatcher.

Thereafter, on March 20, 1915, Faubert conveyed all his interest to Geo. A. Cole, Ed. Malley and Gilbert Ross (Ex. "A-2" R. p. 498).

And on May 24, 1915, Thatcher conveyed a one-tenth interest to J. J. Healey (Ex. "A-5" R. p. 535).

At the opening of the trial on May 25, 1915, Davis, Healey, Cole, Malley, Ross, Forman and Thatcher, the then owners as shown by the conveyances, *supra*, put in evidence, were substituted as plaintiffs; that is Faubert, who had disposed of all his interest, was dropped, and Healey, Cole, Malley, Ross and Forman added. The only criticism attempted by the respondent is that the agreement of November 11, 1913, did not operate as a conveyance and that, therefore, Forman had no interest and was improperly made a party plaintiff at the trial, but, as will appear by inspection of that paper, it contained a clause of conveyance sufficient to convey an interest in the mining claim.

HOMESTAKE ADVERSE

The Homestake placer was located September 8, 1913, by John J. Healey and Murray Scott.

On November 11, 1913, Healey and Scott executed a similar agreement (Ex. "X" R. p. 486) with Thatcher and Forman, which likewise contained (p. 487) a conveyance of a one-tenth interest. This paper was recorded on September 11, 1914.

On May 4, 1914, John J. Healey conveyed his one-half interest to his wife, Lillian V. Healey, by deed (Ex. "Z" R. p. 494) recorded on May 5, 1914.

Prior thereto, on April 14, 1914, Lillian V. Healey executed to John J. Healey a Power of Attorney to execute any deeds (Ex. "A-1" R. p. 496), which was recorded May 2, 1914.

Adverse claim (Ex. "M" R. p. 453) was filed September 24, 1914, at which time the record title, as shown by the abstract accompanying the same, was in Thatcher, Forman, Scott and Lillian V. Healey, with power in John J. Healey to convey the interest of Lillian V. Healey, his wife. The adverse purported to be filed on behalf of Thatcher, Scott, Forman and Frank J. Healey. By Frank J. Healey was intended John J. Healey, as was conceded by the respondent in the instruction asked (R. p. 1221).

The testimony of John J. Healey was taken (R. p. 500-501) to show that the Healey interest was community property under the laws of Nevada.

The adverse suit was filed on September 30, 1914, on behalf of Thatcher, Scott, Forman and John J. Healey.

In the meantime, on May 26, 1914, the Verdi Lumber Company obtained a judgment against Scott which became a lien upon his interest in the claim, and at sheriff's sale on July 6, 1914, the Verdi Lumber Company became the

purchaser and received sheriff's certificate of sale. Under the local law, however, the judgment debtor in such case had six months after sale within which to pay the judgment claim and release the property from the lien thereon; the holder of the sheriff's certificate obtains no title, but merely the right to a deed upon the expiration of the period of six months and failure of the judgment debtor to pay the amount of the judgment and interest.

At the time of filing the adverse claim and suit, therefore, Scott was still the owner of a one-half interest subject to the lien of the execution sale and certificate.

Thereafter, at the expiration of the redemption period, the Verdi Lumber Company assigned to Frank L. Reber its certificate of sale, and on January 26, 1915, Reber received sheriff's deed, and thereafter, on May 24, 1915, conveyed to Ross, Cole, Malley and Davis, who thereby became successors in title to Scott.

And on May 25, 1915, at the opening of the trial, Davis, Cole, Malley, Ross, Forman, Thatcher and John J. Healey were substituted as plaintiffs; that is, Scott was dropped and Cole, Malley and Ross substituted in his place. The plaintiffs in the two suits were thus made the same.

The criticisms attempted by the respondent are that John J. Healey was not a proper party to the adverse claim and suit, that after the execution sale and during the period of redemption Scott was without interest, and that the agreement of November 11, 1913, was not a conveyance to Thatcher and Forman of any interest in the title; and that, therefore, all of the original parties plaintiff in the adverse suit were without interest.

These contentions are without merit even as to John J. Healey who, after the conveyance to his wife, still, as husband, had an interest in the claim as community property and an express power of conveyance.

But, even assuming for the sake of the argument, that John J. Healey was without interest at the time of adverse claim and suit, the inclusion of his name as claimant and plaintiff may be regarded as surplusage and, if necessary, he could have been, or still may be, dropped by amendment without affecting the respondent's rights in any way.

But, aside from all this, it is obvious, so long as one or more of the adverse claimants and plaintiffs showed an interest in the title, it was immaterial to the respondent whether or not all of the plaintiffs could show interest in the title, or whether the whole title was represented by the plaintiffs or some of them.

Nesbit v. Delemar, 24 Nev. 273; 53 Pac. 178.

This Court has held that one co-owner of a mining claim may maintain an action for possession and recover for his own benefit as well as the benefit of his co-owner.

Erhardt v. Boaro, 113 U. S. 527, 537.

We further urge that the question of misjoinder was not raised by demurrer, answer or separate preliminary answer, and the rule is well settled, both in the State and Federal courts, that failure to raise the question by demurrer, answer or separate preliminary answer, and pleading to the merits, waives all pleas in abatement.

Ronnow v. Delume, 24 Nev. 33; 41 Pac. 1070.

Historical Publishing Co. v. Jones, etc., Company, 231 Fed. 631.

Rules U. S. District Court, 9th Dist., Rule No. 9.

Sections 5044-5045, Revised Laws of Nevada, 1912.

Section 1011 R. S. Comp. St. 1901, p. 715.

It is next contended—

THAT THE GUY DAVIS PLACER IS A RELOCATION, AND AS SUCH ADMITS THE VALIDITY OF THE SALT LAKE NO. 3.

On September 5, 1913, Davis and Faubert posted a notice of location of the Davis Lode Claim (Ex. "B" R. p. 236) but the claim was never perfected, no work was done under it, and no record made of the location.

The next day Davis and Faubert posted the following location notice (Ex. "C" R. p. 237):

"LOCATION NOTICE

"September 6, 1913.

"We, the undersigned, do hereby make an Amended Location of the Guy Davis Lode Claim, located on the 5th of September, and located same as a placer claim located in Battle Mountain M. District, Lander Co., State of Nevada, 18 or 20 miles S. W. of the Town of Battle Mountain, and runs 1,300 feet north of Location (32) Monument and 200 feet southerly and 300 feet on each side of monument. Work consists of a 10 foot hole 4x6 feet, 15 or 20 feet south of location monument. This claim shall be known as the Guy Davis placer claim. Located on the 6th day of September, 1913.

"Locators, { Guy Davis, Noah Faubert.

"Witness, D. S. VanOrman."

There is no contention that this notice did not fully comply with the local law regarding location of placer claims.

The contention of the respondent was that, as the first location notice purported to be a relocation as a lode claim of the Salt Lake No. 3 Lode Claim, the element of relocation was carried into the placer location, and, therefore, that the placer location was recognition of the validity of the Salt Lake No. 3 Lode Claim, and comes within the rule laid down in Zerres v. Vanina, 154 Fed. 564.

We think the case at bar is clearly to be distinguished from the Vanina case, which was a relocation of a lode by another lode claimant. Here Davis and Faubert were discoverers of a placer and not appropriators thereof. By the very location of the placer they deemed the existence of any valid lode claim embracing the area so located.

The case of Ziegler v. Dowdy, 114 Pac. 565, aptly states the limitations to be placed on the doctrine laid down in Zerres v. Vanina:

> "The defendant offered evidence tending to prove that the ground is nonmineral; that no discovery was made; that no location notice was posted by plaintiffs within the boundaries of their claim; and that his grantor was in actual possession at the time plaintiffs attempted to make their location. All of this evidence should have been received unless it may be said, as contended by appellees, that the defendant is precluded by denying the validity of the location by reason of having attempted a relocation. That he would be held to have impliedly admitted the validity of plaintiffs' location, were he claiming under the relocation, is undoubtedly true. Belk v. Meagher, 104 U. S. 279, 26 L. Ed. 735; Providence Gold Mining Co. v. Burke, 6 Ariz. 323, 57 Pac. 641; Zerres v. Vanina, 150 Fed. 564, 80 C. C. A.. 366.
>
> "These authorities, however, go no further than to hold that the relocator may not show the invalidity of the original location where he claims under his relocation; and we are unwilling to enlarge the doctrine to the extent of holding that one who has attempted a re-

location, but who had abandoned it and expressly renounced any claim under it, but who nevertheless claims an interest in some other right which would entitle him to be heard had he never attempted such relocation, may not show that the original locator never made a location, but is in fact perpetrating a fraud upon the Government. * * * For the reasons indicated, the judgment of the district court is reversed, and the cause remanded for a new trial."

Here, even by the first notice posted, there could be no implication of recognition of the validity of the Salt Lake No. 3, because the recital therein is that the relocation is made on the grounds of failure to comply with the requirements of law; and any implication from the amended location notice is rebutted by the very fact that the ground could be located as a placer only in case of the invalidity of the Salt Lake No. 3 Lode Claim.

The situation is clearly that the first notice was improvidently posted and that the second notice was posted for the purpose of taking up the ground as a placer claim because it was found to be placer in character, and that the Salt Lake No. 3 was not supported by any discovery of a mineral bearing vein. See testimony of VanOrman who assisted the locators of the Guy Davis in making the location. R. pp. 226 *et seq.*

SUFFICIENCY OF THE COMPLAINT

It is unnecessary in an adverse suit to allege specifically each step taken to acquire a location, or for the plaintiff to point out the defects in the claim of the applicant for patent.

Tonopah Traction Mining Co. v. Douglass, 123 Fed. 936.
Rose v. Richmond, 17 Nev. 25.
Rose v. Richmond, 114 U. S. 576.
Cole v. Ralph (this case) 249 Fed. 84.

The complaint in this action in is strict accord with the local statute of Nevada (Section 5526 of the Revised Laws of Nevada, 1912):

> "In all actions brought to determine the right of possession of a mining claim, or metalliferous vein or lode, where an application has been made to the proper officers of the Government of the United States by either of the parties to such action for a patent for said mining claim, vein, or lode, it shall only be necessary to confer jurisdiction on the court to try said action, and render a proper judgment therein, that it appear that an application for a patent for such mining claim, vein, or lode has been made, and that the parties to said action are claiming such mining claim, vein, or lode, or some part thereof, or the right of possession thereof."

Moreover, both in State and Federal courts it has been repeatedly held that the answer may be taken to aid the complaint, especially after verdict, and it appears specifically from the answer that the defendant is in possession.

Cavender v. Cavender, 114 U. S. 164;
Richardson v. Green, 61 Fed. 423-431;
Provisional etc. v. Layman, 57 Fed. 324, 329, 330;
McManus v. Ophirs M. Co., 4 Nev. 15;
Waples v. Hays, 108 U. S. 6;
Bank of Metropolis v. Guttschlitz, 14 Pet. 19;
Hagan v. Walker, 14 How. 29;
Richardson v. Green, 61 Fed. 431;
Meador Valley Co. v. Dodge, 6 Nev. 261, 264, 265;
Treadwell v Wilder, 8 Nev. 91.

THE QUESTION OF REVENUE STAMPS

The respondent still attempts to raise the point that, when tendered, certain of the conveyances lacked revenue stamps. Proper stamps were affixed before the same were admitted in evidence.

The Revenue Act of 1914 contains no provision that an unstamped instrument shall be void or shall not be admitted as evidence in the courts. In any event, it is established by the authorities that the stamps may be affixed at the time.

Henderson's War Revenue and Income Tax Guide, p. 30.
Weinkerk v. Zeigler, 91 Md. 310;
Bryan v. First Nat. Bank, 205 Pa. St. 7;
Rowe v. Bowman, 183 Mass. 488;
Killip v. Empire Mill Co., 2 Nev. 34, 42;
U. S. v. Griswold, 8 Fed. 556;
Dowell v. Applegate, 7 Fed. 881;
Dowell v. Applegate, 8 Fed. 698.

Furthermore, the consideration in all of the conveyances was ten dollars; no further consideration appeared, and under the Act of Congress of October 22, 1914, no stamps were, therefore, required.

THE REMAINING CONTENTIONS OF RESPONDENT

All of the remaining contentions of the respondent go to the question of the sufficiency of the plaintiffs' evidence to go to the jury, and the sufficiency of the whole evidence to support the verdicts.

The question of non-suit when the plaintiffs rested is

foreclosed by the defendant having gone on with his evidence.

Coeur D' Alene L. B. R. Co. v. Goodwin, 181 Fed. 949-951; 144 C. C. A. 113;
Simpkins Federal Suit at Law, 65;
Wilson v. Haley Live Stock Co., 153 U. S. 39, 43;
Bogk v. Gassert, 149 U. S. 17, 23.

It is idle to contend that the issue of discovery on the lode claims was not properly submitted to the jury. The plaintiffs offered an abundance of evidence tending to establish the absence of any mineral bearing veins or lodes known at the time of placer location, and the defendant then introduced the testimony of the parties who made the locations or the lode claims and other witnesses (including the respondent himself, a mining engineer) as to alleged discoveries of veins or lodes prior to the location of the placers. By parties who had made the location of the lode claims we mean Joseph Jurey, who was one of the locators of the Evening Star and Midas lode claims, and Joseph Jorey and John Jorey who did the location work on the Salt Lake No. 3 for J. H. Clive, the paper locator.

The defendant was also permitted to introduce evidence as to excavations and alleged discoveries after the placer locations; in fact, he was permitted to introduce all testimony and evidence tendered by him as to excavations, exposures and alleged discoveries from the time of the lode locations to the time of trial (R. p. 1160 *et seq.*).

The issue of discovery was fairly presented to the jury in the charge of the court and the jury rendered a general verdict for the plaintiff and special verdicts finding that at the time of placer location there had been no discovery upon any of the lode claims.

There are no exceptions to the rulings of the Court or the admission of evidence during the trial which are of sufficient consequence to justify discussion.

The matter of the Yellow Jacket Lode location, as bearing upon the validity of the Midas lode claim, was removed from the case by the special verdict of the jury that there had been no discovery upon the Midas location at the time of placer location.

Respectfully submitted,

GEO. B. THATCHER,
WILLIAM C. PRENTISS,
Attorneys for Petitioners.